Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership Of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF EQUITY COMMUNICATIONS, L.P.

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SUMMARY

The Commission's current ownership rules have the unintended consequence of forcing owners of multi-station grandfathered groups assembled under the old "contour overlap" rules to shut down small local stations that cannot be transferred as part of a group sale. This can result in the loss of a community's sole local transmission service, as well as local service to underserved local areas and populations. Both results run contrary to the Commission's statutory mandate to increase the number of stations in operation as well as its policy of promoting competition, and programming and viewpoint diversity.

The Commission should amend its rules and policies to prevent such outcomes—either by creating a specific exception for grandfathered groups like Equity or by making its rules better reflect easily-quantified competitive realities. Specifically, the Commission should consider three possible revisions. First, the Commission could maintain some kind of numerical cap while making distinctions between classes of stations within a service. Second, without changing the overall rules, the Commission could create a limited exception for grandfathered groups. Third, the Commission could replace the current numerical caps on station ownership with a more sophisticated approach that incorporates market share and revenue data.

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COMMENTS OF EQUITY COMMUNICATIONS, L.P.

Equity Communications, L.P. ("Equity")[1] respectfully submits these comments in response to the Commission's above-referenced Further Notice of Proposed Rulemaking[2] to show that the Commission's current ownership rules have the unintended consequence of forcing companies like Equity, whose multi-station group was assembled under the old "contour overlap" rules and is grandfathered, to shut down small local stations that cannot be transferred as part of a group sale. The absurd result would be, in Equity's case, the loss of a community's

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[1] Equity is the licensee of commercial radio stations WEZW(FM), WAYV(FM), WTTH(FM), WZBZ(FM), WZXL(FM), WAIV(FM) and WGBZ(FM) in the Atlantic City-Cape May Arbitron Metro Survey Area (the "Atlantic City Metro" or the "Metro").

[2] Further Notice of Proposed Rulemaking, FCC 06-93 (rel. July 24, 2006) (regarding the definition of radio markets and the counting of radio stations for purposes of determining compliance with the Commission's radio multiple ownership rules).

sole local transmission service, as well as local service to underserved local areas and populations—a result contrary to the Commission's statutory mandate to increase the number of stations in operation as well as its policy of promoting competition, and programming and viewpoint diversity. The Commission should amend its rules and policies to prevent such outcomes—either by creating a specific exception for grandfathered groups like Equity or by making its rules better reflect easily-quantified competitive realities.

DISCUSSION

I. BACKGROUND OF THE EQUITY RADIO STATIONS

There are a total of 26 commercial and non-commercial radio stations in the Atlantic City Metro, making it a "tier three market" in which ownership of up to six commercial radio stations, no more than four of which may be in the same service, is permitted.[3] The Equity group of seven FM stations was assembled when the Commission used its "contour overlap" method of counting radio stations, and under that method Equity's ownership of its current group of stations complied with the Commission's multiple ownership rules. However, in its Report and Order on media ownership in 2003,[4] the Commission discarded the contour overlap method, and instead based its counting methodology on information provided by Arbitron.[5] Under the new rules, ownership of a lower power Class A FM station is treated as equivalent to ownership of high-power Class B or C stations, notwithstanding the large disparity in coverage capability between classes. The Commission grandfathered ownership of station groups acquired under the contour overlap methodology, but disallowed assignment or transfer control of such groups to a

[3] 47 C.F.R. § 73.3555(a)(1)(iii).

[4] *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) ("*Biennial Review Order*").

[5] *Id.* ¶¶ 248-286.

new owner absent divestiture of stations sufficient to cause the group to be in compliance with the new rules.[6]

If Equity were to sell its group, it would have to divest at least three FM stations for the sale to comply with the Commission's current multiple ownership rules. It would likely divest three Class A FM stations, WEZW,[7] WAIV and WGBZ (the "Non-compliant Stations"), because these are by far the poorest-performing stations of the group and would represent the least value to a buyer.

The Atlantic City Metro is geographically large. The Non-compliant Stations operate with limited power[8] and their signals reach only the Cape May area and vicinity in the southern portion of the Atlantic City Metro.[9] The population within the composite 60 dBu contour of the three Non-compliant Stations numbers only 97,029, while the population within the Atlantic City Metro as a whole is 371,100.[10] The Non-compliant Stations simulcast, and thus effectively extend, the signals of other Equity stations that cover the more populous northern part of the Metro.[11] In this way, Equity uses a combination of five Class A stations and one Class B station, to provide coverage for a given format throughout a large part of the market. As relatively low-power stations limited to extending the signals of other stations to what is

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6 *Id.* ¶ 487. The Commission did allow some limited relief from this policy in that grandfathered groups of stations may be transferred or assigned to certain "small business" entities. *Id.* ¶¶ 488-489.

7 WDTH changed its call sign to WEZW on September 15, 2006.

8 WEZW, WAIV and WGBZ operate at 4.2, 3.2 and 3.3 kW, respectively.

9 The communities of license of the Non-compliant Stations are approximately 45 miles from Atlantic City; given their low power, these stations effectively cannot reach the Atlantic City portion of the market.

10 *See* <u>Exhibit A</u> hereto (map prepared by duTreil, Lundin & Rackley, Inc. showing predicted coverage contours of the Non-compliant Stations).

11 WEZW simulcasts WTTH, WAIV simulcasts WAYV, and WGBZ simulcasts WZBZ.

essentially a small portion of the Metro, the Non-compliant Stations, on their own, have very low audience shares and produce correspondingly low revenues.[12]

A separate divestiture of the Non-compliant Stations to an out-of-market buyer is impracticable. No buyer would be willing to make an offer for the Non-compliant Stations to operate as a stand-alone local group. Indeed, due to their small market share and inability to realize the economies of scale necessary for profitable operation on their own, these stations would operate at a loss even without considering the cost of capital needed to acquire them. In 2005, the three Non-compliant Stations produced combined net revenues of only $161,239. Had these stations' operations been conducted at the same level as a stand-alone group, they would have incurred total operating expenses of $404,246 for a net loss of $243,007. Even if other reductions in operating expenses could be made without revenue reductions, the vital technical expenses (tower rent, utilities and the cost of a contract engineer) alone totaled $115,332.[13] The Non-compliant Stations are viable only when operated in combination with other in-market stations, particularly when used, as Equity does, to extend the signals of those stations into the southern portion of the Metro by simulcasting.

However, a sale to an in-market buyer is also impracticable. There are three other multi-station groups operating in the Atlantic City Metro. Coastal Backstage System ("Coastal") has 3 FM stations; Millennium Radio Group ("Millennium") has 5 FM stations and 1 AM station; and Access.1 Communications ("Access") has 3 FM and 3 AM stations.[14] Millennium

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12 The market impact of these stations is so small that none of the three stations had a measurable audience share (12+) in the Spring 2006 Arbitron book, and BIA did not assign estimated 2005 revenues to any of the three stations.

13 *See* Exhibit B hereto (containing revenues and expenses estimated on a *pro forma* basis).

14 Access also owns WMGM-TV, the only full power TV station licensed to a community in the southern portion of the Metro.

already exceeds the 4-FM station cap under the current rule while Access cannot acquire a fourth FM station because doing so would cause it to exceed the 6-station overall limit across the FM and AM services. Coastal could acquire one additional FM station, but when recently approached by Equity about acquiring one of the Non-compliant Stations, Coastal did not express interest. Even if Coastal were interested in acquiring one of the Non-compliant Stations, no group currently operating in the market could acquire the other two under the current rules.

The Commission's Rules and policies therefore present Equity with a dilemma. It cannot divest the Non-compliant Stations because there is no willing buyer for those stations. At the same time, it cannot sell its other stations without first divesting the Non-compliant Stations. This dilemma is a direct result of the Commission's policy of treating all FM stations, regardless of their size, signal reach, or market impact, as equally competitive units—an absurd proposition in many cases, as here where the Non-compliant Stations have minimal impact on diversity and competition.[15] Thus, by its current rules, the Commission creates a situation where, in order to consummate a sale of its group, Equity will be forced to take the three Non-compliant Stations off the air and surrender their licenses to the Commission.

This result would disserve the public interest and run contrary to Commission policy because it would eliminate existing service, lessen competition, reduce programming and viewpoint diversity and eliminate a number of community service benefits offered by the three Non-compliant Stations. For example, WEZW is the only radio station licensed to Wildwood Crest, New Jersey, and that community would lose its sole transmission service if that station

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[15] The U.S. Court of Appeals for the Third Circuit has criticized as "unrealistic" the Commission's assumption of equal market shares in the Diversity Index used in the cross-ownership context, whereby each outlet within a media-type is assigned an equal market share despite differences in actual use. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 408-409 (3rd Cir. 2004). Treating all radio stations as equal for the purposes of the radio ownership rules is subject to the same criticism.

were forced to go silent.[16] In addition, Equity is the only radio group in the Metro with formats that are specifically directed to minority group listeners: WTTH and WEZW, which are simulcast, have an Urban Adult Contemporary format, while WZBZ and WGBZ, also simulcast, have a Contemporary Hit Radio/Rhythmic format. Stations WEZW and WGBZ are necessary to bring their respective minority-oriented formats to the southern part of the Metro. Thus, cessation of operation by WEZW and WGBZ would deprive listeners in the southern portion of the Metro of service oriented to minority listeners on which they have come to rely, and would result in a substantial decrease in the diversity of radio programming available to residents of the southern part of the Metro.

More generally, each of the Non-compliant Stations provides local service to the Cape May area and the southern portion of the Atlantic City Metro. While like most areas in the Eastern Seaboard, the Cape May area can receive a large number of radio stations, it has relatively few radio stations that are licensed to local communities within that portion of the Metro, and which actually provide meaningful local service to their listeners.[17] If Equity were forced to take the Non-compliant Stations off the air, the Cape May area would lose an important source of local programming.

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16 The FCC generally prohibits the removal of an existing station representing a community's sole local broadcast service and entertains waivers only in "rare circumstances where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population. *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 5 FCC Rcd 7094, ¶ 17 (1990).

17 Examples of the local programming provided by the Non-compliant Stations include: (i) South Jersey news and weather reports every hour from 6 a.m. to 9 p.m. on WAIV; (ii) Atlantic County Health Today, a health-oriented program that airs Saturday mornings on WEZW and is directed to the South Jersey African-American community; and (iii) Spotlight on Atlantic City, which airs Saturday morning on WEZW, is hosted by the mayor of Atlantic City and offers call-in discussion of municipal programs and community service initiatives in both Atlantic and Cape May Counties.

As discussed below, in the context of grandfathered groups of stations, the Commission should revise its rules and counting methodology to account for audience and revenue shares, and thereby recognize the widely varying impact that individual FM stations have on competition and diversity.

II. AUTHORITY TO AMEND THE RULES

A. Section 202(h)

In the *Biennial Review Order*, the Commission rejected the argument made by some commenters that Congress intended the ownership levels set forth in the 1996 Act[18] to be set in stone for all time, [19] finding instead that the agency "retain[ed] the authority—indeed, the obligation—to determine [itself] whether a change in the rules would serve the public interest."[20] The Commission made clear that Section 202(h) requires a continuing reassessment of whether the ownership rules serve the public interest. By failing to adequately account for the situation of grandfathered multi-station groups like Equity and the disparate coverage capability of Class A vs. Class B and C stations, the current rules clearly do not serve the public interest and should therefore be changed.

B. Section 202(b)

In addition, strict application of the current rules to situations like Equity's would produce results directly contrary to the clear intent of Congress. Equity's situation falls squarely into the exception to the ownership limits provided in the Act itself:

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18 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

19 18 FCC Rcd 13620, ¶¶ 266-269.

20 *Id.* ¶ 267, citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002).

> Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.[21]

As described above, allowing Equity to sell its entire group of stations intact would increase the number of stations in operation as compared to a situation in which Equity is compelled to shut down its three weakest stations in order to sell the remaining stations. At the very least, the Commission should give effect to this Congressional directive by providing, in addition to its existing ownership rules, a clear framework for application of this exception.

III. PROPOSED RULE REVISIONS

Equity proposes three possible revisions of the multiple ownership rules that would prevent companies in its situation from having to shut down stations that cannot be operated except as part of a multi-station group where no other group can acquire them. First, the Commission could maintain some kind of numerical cap while making distinctions between classes of stations within a service. Second, without changing the overall rules, the Commission could create a limited exception for grandfathered groups. Third, the Commission could replace the current numerical caps on station ownership with a more sophisticated approach that incorporates market share and revenue data.

A. Numerical Caps with Distinctions Between Station Classes

The Commission could easily add a greater degree of reality to the current system of numerical caps by making distinctions between classes of stations. For example, a Class B

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[21] 1996 Act, § 202(b)(2).

station might be treated as the equivalent of two Class A stations, and a Class C station, of three Class A stations. Thus, one might be able to own only four Class B stations in a single market, or three Class B stations and two Class A stations, and so on.

B. A Limited Exception for Grandfathered Groups

In the *Biennial Review Order*, the Commission rejected the idea of incorporating audience or revenue share into its radio multiple ownership rules, finding that "the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets.[22] The Commission thus appeared to be concerned that under an audience or revenue share based cap, a party could acquire a large number of low-performing stations in a market and negatively impact competition and diversity simply by controlling so many of the available outlets.

While there may be some validity to that approach as a general matter, the underlying rationale of promoting competition is turned on its head when the policy is applied to grandfathered stations. In this context, there is no risk of a party acquiring a large number of stations with currently low market shares, and then using those channels to stifle competition and diversity in the market. Rather, the owner of a grandfathered group such as Equity seeks only to maintain the *status quo,* where the failure to maintain that *status* quo is likely to result in stations being forced off the air, thereby lessening the number of operating radio channels in the market, lessening competition and diversity, and depriving listeners of currently available radio service.

The Commission should exercise its authority to amend its current counting methodology under its ownership rules with respect to grandfathered groups of stations to create an exception that would take into account some combination of audience and revenue share,

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[22] 18 FCC Rcd 13620, ¶ 300.

rather than treating all stations equally. This would prevent the perverse consequence of a grandfathered multi-station group such as Equity having to shut down its weakest stations in order to sell the group because no buyer is available for those weaker stations. Such a policy would cause minimal disruption to the Commission's "bright line" Arbitron-based counting methodology because it would apply only to sales of grandfathered groups of stations, and only in cases where the stations required to be divested under current rules have minimal impact on competition and diversity in the market. Alternatively, the Commission should adopt specific waiver criteria which would enable parties such as Equity to seek a waiver of the Commission's multiple ownership rules to permit grandfathered groups to be sold intact where divestiture would be impracticable and contrary to the public interest.[23]

C. Broader Consideration of Market Share and Revenue

The rationale described above for considering the differences in revenues and market share would also support entirely replacing the current system of numerical caps. Although expanding such an approach beyond the limited case of grandfathered groups raises complicated and difficult administrative questions, the possibility should nonetheless be considered by the Commission with the recognition that difficulties in administering such an

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[23] As a guide to crafting a rule or waiver policy that would address this situation, the Commission should look to the waiver criteria developed to permit the acquisition of "failing" television stations under the television multiple ownership rule. 47 C.F.R. 73.3555, n. 7. Under those criteria, a waiver of the television multiple ownership rule will be presumed to be in the public interest if the "failing" station has low audience share and negative cash flow, a sale to an out-of-market buyer would be impracticable, and the consolidation would result in public interest benefits. The Non-compliant Stations are the equivalent of "failing" stations that cannot be operated apart from the larger group in which they are currently included, and would therefore presumably qualify for such a waiver. Interestingly, far from causing a deluge with failing television station waiver requests, only about a half a dozen or so have been filed since the adoption of those waiver criteria.

approach across the board should not deter the Commission from applying it to the narrow case of grandfathered groups, as discussed above.

CONCLUSION

In the case of grandfathered groups like Equity, by reducing rather than promoting programming diversity, the current ownership rules would produce patently absurd results clearly contrary to the public interest as defined by both Congress and the Commission. The Commission can easily address this specific problem, either by creating guidelines for implementing the exception contained in Section 202(b) or by creating an exception to the current rules for grandfathered groups. But these changes would ignore the two fundamental weaknesses of the current rules: the failure to distinguish between classes of stations and the failure to consider market share and revenue. Unless the Commission begins to consider these things, its media ownership rules will produce absurd results that disserve the public because they will not reflect competitive realities in any real sense.

Respectfully submitted,

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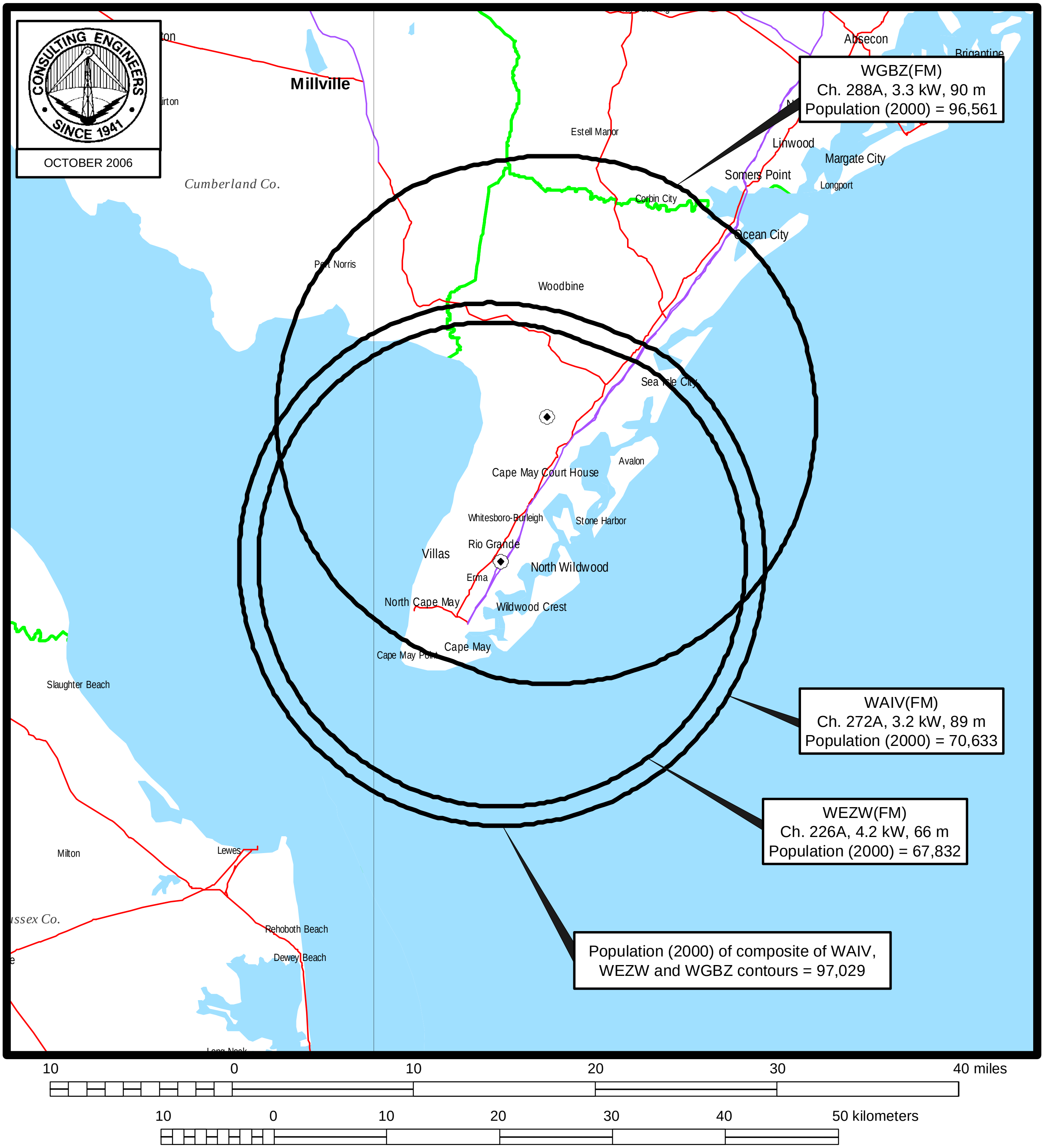
Exhibit A – Predicted Coverage Contours

Figure 1



PREDICTED 60 DBU COVERAGE CONTOURS

WEZW(FM), WILDWOOD CREST, NEW JERSEY
WAIV(FM), CAPE MAY, NEW JERSEY
WGBZ(FM), CAPE MAY COURT HOUSE, NEW JERSEY

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Exhibit B – Revenues and Expenses of Non-compliant Stations Estimated on *Pro Forma* Basis

2005 PROFORMA STATEMENT OF CAPE MAY STATIONS STAND-ALONE OPERATION

	93.1 WDTH	102.3 WAIV	105.5 WGBZ	TOTAL
REVENUES:				
L/D	12,260	42,353	63,052	117,665
L/Agcy	5,519	17,938	27,805	51,262
TOTAL REVENUES (1):	17,779	60,291	90,857	168,927
- Agcy Comm	- 828	- 2690	- 4170	- 7,688
NET REVENUES:	16,951	57,601	86,687	161,239
SALES EXPENSE:				
AE Commissions @ 20%:	3,390	11,520	17,337	32,247
T&E/Printing	500	500	500	1,500
	3,890	12,020	17,837	33,747
PROGRAMMING EXPENSE;				
PD/On-Air/Production (2):	10,000	10,000	10,000	30,000
P/T On-air	5,000	5,000	5,000	15,000
Selector Music Scheduling	1,500	1,500	1,500	4,500
Consultant (3):	4,000	4,000	4,000	12,000
Music License @ 3.5% net	593	2,016	3,034	5,643
Remote Costs	1,000	1,000	1,000	3,000
	22,093	23,516	24,534	70,143
TECHNICAL EXPENSE;				
Tower Rent	34,572	23,760	24,000	82,332
Utilities	5,000	5,000	5,000	15,000
Contract Engineer (4):	6,000	6,000	6,000	18,000
	45,572	34,760	35,000	115,332
GENERAL & ADMIN:				
General Manager/Sales Mgr (5):	25,000	25,000	25,000	75,000
PR Tax+Health Insurance(6):	7,785	9,003	9,875	26,663
Traffic/Reception (7):	8,500	8,500	8,500	25,500
Other Insurance (8):	8,500	8,500	8,500	25,500
Telephone (8):	6,000	6,000	6,000	18,000
Bad Debt @ 1% net revs	169	576	866	1,612
Studio Rent (9):	2,500	2,500	2,500	7,500
License Fee:	1,750	1,750	1,750	5,250
	60,204	61,829	62,991	185,024
TOT. OPERATING EXP:	131,759	132,125	140.362	404,246
BCF (NCF):	(-114,808)	(-74,524)	(-53,675)	(-243,007)

(1): Cape May Station Share of Simulcast Audience Projected to Local/Direct and Local/Agency Simulcast Revenues
(2): PD Salary of $30k/yr allocated across 3 stations
(3): Consultant retainer of $12k/yr across 3 stations
(4): Used current monthly rate of $500 per station
(5): GM Salary of $75k/yr allocated across 3 stations
(6): Payroll Tax + Health Insurance: 15% of payroll
(7): Traffic Dir/Receptionist/Bookkeeper Salary of $30k/yr across 3 stations
(8): Insurance & Telephone: 25% and 33% of 9-station cluster expense
(9): Estimate of $7500 / yr for modest studio rent